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84-1333 (1)

No.

IN THE

Supreme Court of the United States

October Term, 1984

UNITED STATES OF AMERICA,
Respondent,

versus

UNITED STATES CURRENCY IN THE SUM OF FOUR HUNDRED THIRTY FIVE THOUSAND DOLLARS, MORE OR LESS,
Defendant.

and

FRANCESCO CUTAIA,
Claimant-Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition for Writ of Certiorari

ROBERT M. SPADARO
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2a/p

QUESTION PRESENTED FOR REVIEW

1. Whether a delay of 31 months by the United States Government in instituting forfeiture proceedings constituted a violation of the "due process" claim of the FIFTH AMENDMENT by the United States Constitution and 19 U.S.C. Secs. 1602-1604?

LIST OF INTERESTED PARTIES

Counsel of record for FRANCESCO CUTAIA certifies that the following parties have an interest in the outcome of this case.

1. United States of America, represented by Raymond J. Dearie, United States attorney, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201.

2. Solicitor General
Department of Justice
Washington, D.C. 20530

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion and judgment of the Court of Appeals, affirming the District Court's Judgment against the Petitioner appears in Appendix A to this petition. This decision is not reported. The Opinion and Order of the District Court appears in Appendix B. This Opinion is not reported.

JURISDICTION

The Second Circuit's Opinion and Judgment affirming the District Court's Judgment against the Petitioner, dated and entered November 28, 1984, is set forth in Appendix A. This Petition for Certiorari is being filed within ninety (90) days of entry of said judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

1. Fifth Amendment to the Constitution of the United States Amendment V(1791).

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 19 U.S.C. Sec. 1602. Seizure; report to customs officer.

It shall be the duty of any officer, agent or other person authorized by law to make seizures of merchandise or baggage subject to the seizure for violation of the customs laws, to report every such seizure immediately to the appropriate customs officer for the district in which such violation occurred, and to turn over and deliver to such customs officer any vessel, vehicle, merchandise, or baggage seized by him, and to report immediately to such customs officer every violation of the customs laws.

3. 19 U.S.C. Sec. 1603. Seizure; customs officer's reports

Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs laws is

discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report promptly such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.

4. 19 U.S.C. Sec. 1604. Seizure; prosecution. It shall be the duty of the Attorney General of the United States immediately to inquire into the facts of cases reported to him by customs officers

and the laws applicable thereto, and, if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court or the Court of International Trade is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless, upon inquiry and examination, the Attorney General decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his discretion in the premises.

STATEMENT OF THE CASE

The defendant United States currency was seized, from the possession of the Claimant, on November 28th, 1980, by agents of the United States at John F. Kennedy International Airport in Queens, New York.

Claimant failed to file the requisite report pursuant to 31 U.S.C. Sec. 1101 and 1058 (1980) declaring the transportation of the defendant currency.

On April 9, 1981, the Claimant was convicted after trial without jury, in the Eastern District of New York, before the Honorable Judge Eugene H. Nickerson, of having knowingly and wilfully transported the currency from the United States without having filed the requisite report. On March 9, 1982 the Claimant was found guilty of conspiring to import heroin into the United States.

In may of 1983 the Claimant brought on an Order to Show Cause, claiming violation of his constitutional right to "due process", calling for the return of the defendant currency.

On June 10, 1983, approximately thirty-one (31) months after seizure, the respondent, United States of America, instituted an action for the forfeiture of the defendant currency.

By Memorandum and Order of the district court, dated April 24, 1984, the defendant currency was forfeited to the United States government. Judgment, dated May 8, 1984, was entered May 9, 1984.

Petitioner, Francesco Cutaia, appealed to the United States Second Circuit Court of Appeals on the basis that the government's delay of thirty-one (31) months in failing to notify the Claimant of his right to petition for remission and

in instituting forfeiture proceedings, constituted a violation of Claimant's right to due process under the Fifth Amendment to the Constitution and violation of 19 U.S.C. Secs. 1603 and 1604. The Second Circuit Court of Appeals affirmed the District Court Judgment. The appellate court found that the "claimant's claim to this currency was extinguished as of that (failure to declare the currency upon leaving the country) conviction, (and so) he suffered no prejudice as a consequence of the delay under the doctrine of 'res judicata'."

The court also cited the fact that the Claimant had taken no steps available to pursue the return of the currency until thirty-one months after seizure. Claimant now seeks relief from this Honorable Court.

REASONS FOR GRANTING WRIT OF CERTIORARI

IN THE CASE OF UNITED STATES of AMERICA vs. $23,407.69 IN US CURRENCY, 715 F. 2d 162 (1983), THE FIFTH CIRCUIT COURT OF APPEALS DENIED FORFEITURE OF MONEY SEIZED IN A DRUG ARREST, RESULTING IN CONVICTION. THE FIFTH CIRCUIT DECISION IS IN DIRECT CONFLICT WITH THE WITHIN DECISION OF THE SECOND CIRCUIT COURT OF APPEALS.

The Fifth Circuit Court of Appeals found that a six month delay in giving notice of forfeiture and a total of a thirteen month delay in bringing a forfeiture complaint, was a violation of due process under the Fifth Amendment to the Constitution and, further, was violative of 19 U.S.C. Secs. 1603 and

1604, as inordinate and unjustified.

In the case at bar, the government never notified the claimant of his right to petition for remission; the United States attorney did not "immediately inquire into the facts"; and did not "forthwith cause the proper (forfeiture) proceedings to be commenced and prosecuted without delay." 19 U.S.C. Sec. 1604. It is the government's position that the delay was due to a "misunderstanding" between the Customs Service and the Drug Enforcement Administration, each believing the other was taking jurisdiction over the forfeiture of the defendant currency.

This Honorable Court, in ordering forfeiture in the case of United States vs. Eight Thousand Eight Hundred Fifty Dollars, 455 U.S. 1015, 103 S. Ct. 2005 (1983), stated:

Under these procedures, the

> Customs Service notified any person who appears to have any interest in the seized property's liability to forfeiture and of the Claimant's right to petition...for remission.

This Court went on to state:

> If the Claimant does not file a petition...customs officers must prepare a full report for the United States attorney. The United States attorney is required to "immediately inquire into the facts" and, if it appears probable that a forfeiture had incurred, forthwith to cause the proper proceedings to be commenced and prosecuted without delay.

The government can not unduly and unjustifiably delay in proceeding to a

final determination of which party should have proper and legal title and possession of seized property. The Constitution mandates such prompt action. The government's prolonged delay, in connection with the case at bar, requires return of the money seized.

CONCLUSION

For all the foregoing reasons, it is submitted that this Petition for Writ of Certiorari should be granted, thereby allowing the Court to fulfill the "due process" guarantees of the Fifth Amendment.

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New York, New York 10279
(212) 608-3550

PROOF OF SERVICE

CERTIFICATE OF BAR MEMBER

I, Robert M. Spadaro, the attorney for Francesco Cutaia, petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 19th of February, 1985, I served three (3) copies of the foregoing Petition for Writ of Certiorari on all the parties required to be served under Rule 28 of the Rules of the United States Supreme Court, as follows:

1. Raymond J. Dearie, Esq, United States Attorney, Eastern District of New York, attorney for United States of America, Respondent, at 225 Cadman Plaza East, Brooklyn, N. Y., 11201.

2. Solicitor General, Department of Justice, Washington, D.C. 20530.

By depositing same in a United States Post Office with first class postage prepaid and that forty copies were deposited in a United States Post Office with first class postage prepaid and properly addressed to The Clerk of the Supreme Court of the United States, Supreme Court Building, One First Street, N.E. Washington, D.C. 20543.

Robert M Spadaro

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APPENDIX "A"

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

UNITED STATES CURRENCY IN THE SUM OF FOUR HUNDRED THIRTY FIVE THOUSAND DOLLARS, MORE OR LESS,

Defendant,

and

FRANCESCO CUTAIA,

CLAIMANT-APPELLANT.

No. 84-6221

United States Court of Appeals

Second Circuit.

Nov. 28, 1984.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United

States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it is hereby affirmed.

Appeal from the United States District Court for the Eastern District of New York.

Before LUMBARD, WINTER and PRATT, Circuit Judges.

PER CURIAM:

Claimant-appellant seeks $435,000 in United States currency seized by federal agents on November 28, 1980. On April 9, 1981 claimant was convicted of knowingly and willingly transporting the currency in question outside the United States without filing the required reports in violation of 31 U.S.C. Secs. 1058 and 1101.

The United States did not begin forfeiture proceedings until some thirty-

one months after the currency had been seized, and claimant argues that this delay violated his due process rights and bars forfeiture of the currency. The claim is without merit. Under United States v. $8,850, 103 S. Ct. 2005 (1983), we must determine whether delay in filing a civil forfeiture proceeding is so unreasonable as to deprive a claimant of due process by applying the four factors set out in Barker v. Wingo, 407 U.S. 514 (1974), governing the analogous issue of pretrial delay in criminal proceedings. The first factor, the length of the delay, weighs against the government. In other circumstances such a considerable length of time might well bar a forfeiture proceeding. The second factor, the reason for the delay, must be resolved neutrally since the delay appears to have been the result of an innocent bureaucratic mix-up. The final two factors weigh so heavily

against the claimant, however, that summary judgment was rightly granted. The claimant here took none of the steps available to pursue the return of the currency until almost thirty months after the seizure. Once he made such a claim the government responded with alacrity. Finally, claimant's conviction of 31 U.S.C. Secs. 1058 and 1101 establishes the entitlement of the government to the forfeiture of the currency. Since the claimant's claim to this currency was extinguished as of that conviction, he suffered no prejudice as a consequence of the delay under the doctrine of res judicata. United States v. Podell, 572 F. 2d 31 (2d Cir. 1978). Claimant's plea agreement with regard to a narcotics charge does not refer to the currency in question and has no bearing whatsoever on the forfeiture proceeding.

AFFIRMED.

APPENDIX "B"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

CIVIL ACTION

VERSUS

NO. 83 C 2480

UNITED STATES CURRENCY

AMOUNTING TO $435,000

JUDGMENT

A memorandum and order of Honorable Eugene H. Nickerson, United States District Judge, having been filed on April 30, 1984, granting the government,s motion for summary judgment, and directing that payment be entered forfeiting and condemning the currency to the use and benefit of the United States, it is

ORDERED and ADJUDGED that the government's motion for summary judgment is granted; and that the currency is forfeited and condemned to the use and benefit of the United States.

_____

CLERK of COURT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

VERSUS

UNITED STATES CURRENCY

AMOUNTING TO $435,000

CIVIL ACTION

NO. 83 C 2480

OPINION

The government brought this action to forfeit and condemn $435,000 of United States currency pursuant to 21 U.S.C. Sec. 881 and 31 U.S.C. Sec. 5317(b). Francesco Cutaia filed a claim to the currency. Both sides move for summary judgment.

Cutaia was convicted after trial before this court without a jury of having knowingly and wilfully transported the currency from the United States without having filed the requisite report. The currency was therefore subject to forfeit under 31 U.S.C. Sec 5137(b) (formerly 31 U.S.C. Sec. 1102 (a)). Thereafter defendant was convicted in a large case involving charges of conspiracy to import heroin into the United States. The

currency was held as evidence in that case.

Cutaia admits that the currency was subject to forfeiture, but argues that he was deprived of due process because of the delay, 31 months, from the date of seizure to the date the action was commenced. Cutaia made no claim to the currency before May of 1983. This proceeding was commenced June 10, 1983. Even now he offers no competent evidence to show that he owns the funds. Indeed, from the evidence in the criminal case it is clear that he was but a courier taking back funds to Italy to pay for heroin delivered to the United States. Under United States v. $8,850.00, 103 S. Ct. 2005 (1983), the contention that Cutaia was denied due process is without the faintest merit.

The argument that this action constitutes double jeopardy is equally meritless.

The motion of Cutaia is denied. The government's motion is granted. Judgment may be entered forfeiting and condemning the currency to the use and benefit of the United States. So ordered.

Brooklyn, New York

April 24, 1984

_____

U.S.D.J.